No. 15146.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CLIFFORD L. DUKE, JR., LOUIS [illegible] BALLARD and VIC BUONO,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the Southern District of California, Southern Division.

OPENING BRIEF ON BEHALF OF APPELLANT, VIC BUONO.

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Jurisdictional Statement.

The criminal prosecution in the case at bar was instituted on an indictment containing ten counts. In counts V, VI, VIII, IX and X of the indictment appellant Vic Buono is charged with violations in the Southern District of California of United States Code, Title 18, Section 545, smuggling goods into the United States. Counts IV and VII purport to charge appellant Buono with two conspiracies in violation of United States Code, Title 18, Section 371. The District Court, therefore, had original jurisdiction under the provisions of United States Code, Title 18, Section 3231.

Appellant Buono was convicted on counts VII, VIII, IX and X and acquitted on counts IV, V and VI. Jurisdiction to review the judgment of conviction is conferred upon this Honorable Court by United States Code, Title 28, Section 1291.

Statement of the Case.

Appellants were charged in an indictment containing 10 counts. Only counts IV to X, inclusive, relate to appellant Buono. [Tr. of R. pp. 2-13.] Count IV charged in substance that from April, 1953, to December, 1954, in the Southern District of California, appellants Buono, Duke, and Ballard, together with John W. Hadzima, Phyllis Hadzima, Mary Ascani, Roy Purselli, Robert Helm and others conspired to commit offenses against the United States, namely, violations of 18 U. S. C. A., Section 545, by knowingly and willfully, with intent to defraud the United States, smuggling and clandestinely introducing into the United States merchandise, namely, psittacine birds, which should have been invoiced; by fraudulently and knowingly importing merchandise, namely, psittacine birds, into the United States contrary to United States Code, Title 19, Chapter 4, and particularly Sections 1461 and 1484 thereof; and by knowingly receiving, concealing and facilitating the transportation and concealment of such merchandise after importation, knowing the same to have been imported contrary to United States Code, Title 19, Chapter 4, and particularly Sections 1461 and 1484 thereof. Count IV further alleged seven overt acts in furtherance of the conspiracy. [Tr. of R. pp. 6-8.]

Count VII charged, in terms substantially identical with Count IV, that from about June 1, 1953, to about October 31, 1953, appellants Duke and Buono conspired with Robert Helm, Nicholas Spicuzza, George Todd, Albert W. Appel, and others to commit the same offenses against

the United States in the same manner as charged in Count IV. Count VII also alleged six overt acts in furtherance of the conspiracy. [Tr. of R. pp. 9-12.]

Count V charged in substance that on or about May 13, 1953, appellants Duke, Ballard and Buono knowingly and willfully, with intent to defraud the United States, smuggled and clandestinely introduced into the United States merchandise, namely, psittacine birds, which merchandise should have been invoiced, and that they imported said merchandise into the United States in violation of United States Code, Title 19, Chapter 4, and particularly Sections 1461 and 1484 thereof. This count purported thereby to charge a violation of United States Code, Title 18, Section 545. [Tr. of R. p. 8.]

Counts VIII, IX and X were similar to Count V, except that only appellants Duke and Buono were charged, and the dates mentioned were, respectively, June 15, 1953, August 28, 1953, and September 28, 1953. [Tr. of R. pp. 12-13.]

Count VI charged that on or about May 13, 1953, appellants Duke, Ballard and Buono knowingly received, concealed and facilitated the transportation and concealment of certain merchandise, namely, psittacine birds, knowing the same to have been imported into the United States contrary to United States Code, Title 19, Chapter 4, and particularly Sections 1461 and 1484 thereof. Count VI likewise purported to charge a violation of United States Code, Title 18, Section 545. [Tr. of R. p. 9.]

Appellant Buono first moved to dismiss the indictment and subsequently entered pleas of not guilty as to all counts in which he was charged. [Tr. of R. pp. 33-34.] The grounds for the motion to dismiss the indictment were stated therein, as follows [Tr. of R. pp. 38-39]:

> "1. None of the Counts Four to Ten, inclusive, state facts sufficient to constitute a cause of action.
>
> "2. Counts Four to Ten, inclusive, purport to charge a violation of a specific statute or a conspiracy to violate said statute, to-wit, Section 545, Title 18, United States Code. The facts alleged in Counts Four to Ten, inclusive, show that if any offense against the United States was in fact committed, the offense would be a violation of Sections 264 and 271 of Title 42, United States Code, a misdemeanor instead of a violation of Section 545 of Title 18, United States Code, which offense is designated a felony. (None of Counts Four to Ten, inclusive, of the Indictment state a public offense against the United States.)
>
> "3. Count Seven of the Indictment should be disdismissed since Count Four alleges a continuing conspiracy and Counts Four and Seven are identical in language, except that Count Seven does not name LOUIS GLEN BALLARD as a defendant, and the time of the conspiracy alleged in Count Seven falls within the time alleged in Count Four. One conspiracy cannot be split up into several conspiracies and the addition or withdrawal of a member does not constitute a new conspiracy."

Appellant Buono's motion to dismiss the indictment was denied, and the case was set for trial. [Tr. of R. p. 68.]

The trial was lengthy. The reporter's transcript of the proceedings approaches six thousand pages in length. Appellant Buono has briefly summarized the evidence in his Statement of Evidence in Narrative Form. That statement appears to be adequate for a consideration of the questions presented on this appeal. The evidence, as stated therein, was as follows [Tr. of R. pp. 367-370]:

> "Early in the year 1953, John Hadzima, Nicholas Spicuzza, George Todd and others were, and for a considerable time prior thereto had been, engaged together in the business of smuggling psittacine birds into the United States of America. In the latter part of February, 1953, Clifford L. Duke, Jr., an attorney at law, and Robert Helm, an aviator, joined this smuggling group in the illegal importation of psittacine birds. Duke acted as attorney for the conspirators, and, according to the testimony of the Government witnesses, advised them concerning their smuggling activities, and induced Robert Helm to enter the conspiracy and smuggle psittacine birds from Mexico into the United States by airplane.
>
> "After Duke and Helm had entered the conspiracy, dissention arose between John Hadzima and Nicholas Spicuzza over the handling of the smuggling business; each one accusing the other of stealing psittacine birds which were to be or had been brought from Mexico to the United States. Thereafter, John Hadzima and Nicholas Spicuzza agreed to and did operate independently of each other in the smuggling of psittacine birds, but, according to their testimony, Duke and Helm continued to act in concert with both of them.
>
> "After the split between Hadzima and Spicuzza, many loads of psittacine birds were smuggled into

the United States by Helm and other confederates of Hadzima and/or Spicuzza, and some of these loads, which Spicuzza and his confederates had been instrumental in obtaining and illegally importing into the United States, were "hijacked" and stolen by Hadzima and some of his confederates. According to the testimony, these birds were flown into the United States in airplances (*sic*) piloted by Helm, who delivered them at times and places where they were to be stolen by Hadzima. At all times, Duke and Helm were in contact with Hadzima and undertook to keep him advised of the time and place the smuggled psittacine birds were to be delivered in the United States, with the intention that, immediately after their delivery in the United States by Helm, who was paid by Spicuzza to smuggle them from Mexico, they should be stolen by Hadzima.

"It further appears from the evidence that all of the *sp*ittacine (*sic*) birds which were involved in this prosecution were delivered to one or another of the conspirators by a Mr. Laimon, who operated a bird store in Mexico City, and that Mary Ascani, an unindicted co-conspirator and witness at the trial, who operated a pet shop in Burbank, California, bought and-or marketed the smuggled psittacine birds, irrespective of which of the conspirators delivered them to her after their illegal importation.

"The evidence offered to connect the defendant Victor F. Buono with the smuggling acitivities (*sic*) of the indicted and unindicted conspirators was to the effect that, at all times mentioned in the indictment, he was a licensed bail bond agent; that he furnished bail bonds for most of the conspirators who were arrested; that meetings of the conspirators were held at his office, from time to time, beginning in March, 1953 and continuing to October, 1953; that

he was present at these meetings and discussed various phases of the smuggling activities of Spicuzza, Todd, Hadzima and others, both before and after their indictment for smuggling, and knew that they were all engaged in smuggling psittacine birds; that, in June, 1953, he loaned $2,500.00 to Helm for a down payment on an airplane which he knew or should have known was to be and which was, afterwards, used by Helm in smuggling psittacine birds into the United States; that he loaned various sums of money to Spicuzza after he knew that Spicuzza had been indicted for conspiracy to smuggle psittacine birds; that Spicuzza used this money to defray expenses incurred in the smuggling of psittacine birds; and that Buono was not to receive, and did not receive, any portion of the profits derived from the smuggling operations of Todd, Spicuzza or Helm, and was not paid any interest on the money loaned to them, but was repaid his advances.

"As to Counts VIII, IX and X of the Indictment, it was stipulated at the trial that the only theory on which the defendant Buono could be convicted was that he had conspired to smuggle psittacine birds into the United States."

At the conclusion of the Government's case, appellant Buono moved for a judgment of acquittal as to him on counts IV through X, inclusive. [Tr. of R. pp. 149-150.] As an alternative it was moved that Count VII be included with Count IV. [Rep. Tr. of Proceedings, Vol. 13, p. 1901.] The motions were made on the same grounds as appellant Buono's motion to dismiss the indictment. [Rep. Tr. of Proceedings, Vol. 13, p. 1898 *et seq.*] They were denied. [Tr. of R. p. 150.] At the

conclusion of all the evidence, appellant Buono renewed his motion for judgment of acquittal. [Tr. of R. p. 223.] The Court denied the motion after the jury had returned its verdict. [Tr. of R. p. 246.]

Appellants Duke and Ballard were found guilty on all counts in which they were charged. [Tr. of R. pp. 248-260.] Appellant Buono was found not guilty on counts IV, V and VI, and guilty on counts VII, VIII, IX and X. [Tr. of R. pp. 261-267.]

Appellant Buono moved for a new trial as to counts VII, VIII, IX and X of the indictment on the ground, *inter alia,* that the Court erred in denying his motions for acquittal made at the conclusion of the Government's case and after all parties had rested. [Tr. of R. p. 288.] The motion was denied. [Tr. of R. p. 295.]

The Court pronounced its judgment of conviction of appellant Buono on counts VII, VIII, IX and X. He was sentenced to serve two years in the custody of the Attorney General on each count, the sentences to run concurrently, and to pay fines of $3,000.00 on count VIII, $1,000.00 on count IX, and $1,000.00 on count X. Execution of the prison sentence was suspended and appellant Buono was placed on probation for a period of three years. The fine on count VIII was made payable in such installments as the probation officer may direct. Execution of the judgment as to the fines on counts IX and X was stayed for ninety and one hundred and twenty days, respectively. Tr. of R. pp. 308-310.]

Appellant Buono filed timely notice of appeal from the judgment and from the order denying his motion for a new trial. [Tr. of R. pp. 315-317.]

Two basic questions are raised by appellant Buono on this appeal. They are:

1. Could appellant Buono lawfully be indicted for or convicted of violations of United States Code, Title 18, Section 545, or of conspiracy to violate said section, on allegations and evidence showing that the objects the importation of which was involved were psittacine birds, in view of United States Code of Federal Regulations, Title 42, Section 71.152, which governs the importation of such birds and violation of which is made a misdemeanor by United States Code, Title 42, Section 271?

2. Could appellant Buono lawfully be indicted for or convicted of the conspiracy purportedly charged in count VII of the indictment in view of the failure of the Government to allege or prove facts which would support a conclusion that such purported conspiracy, of which appellant Buono was convicted and upon which his conviction of the substantive offenses was based, had any existence separate from the conspiracy charged in count IV and of which he was acquitted?

Both of the foregoing questions were raised on appellant Buono's motion to dismiss the indictment, his motion for acquittal made at the conclusion of the Government's case, his motion for acquittal after all parties had rested, and his motion for a new trial. It was and is appellant Buono's contention that each of these questions must be answered in the negative. Appellant Buono further contends that the trial court's erroneous determination as to each of them was prejudicial and that error as to either of them requires a reversal.

Specification of Errors Relied Upon.

1. The trial Court erred in denying appellant Buono's motion to dismiss the indictment. [Tr. of R. pp. 33-34, 38-39, 68.]

2. The trial Court erred in denying appellant Buono's motion for acquittal made at the conclusion of the Government's case. [Tr. of R. pp. 149-150.]

3. The trial Court erred in denying appellant Buono's motion for acquittal made after all parties had rested. [Tr. of R. pp. 223, 246.]

4. The trial Court erred in denying appellant Buono's motion for a new trial. [Tr. of R. pp. 288, 295.]

ARGUMENT.

I.

Appellant Buono Could Not Lawfully Be Indicted for nor Convicted of Violations of United States Code, Title 18, Section 545, nor of Conspiracy to Violate Said Section, on Allegations and Evidence Showing That the Objects the Importation of Which Was Involved Were Psittacine Birds.

At all pertinent times United States Code, Title 18, Section 545, provided:

> "Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced * * *; or
>
> "Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law—
>
> "Shall be fined not more than $5,000 or imprisoned not more than two years, or both. * * *"

United States Code, Title 18, Section 371, provided:

> "If two or more persons conspire * * * to commit any offense against the United States, * * * and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> "If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the punishment provided for such misdemeanor."

At all pertinent times 42 Code of Federal Regulations, Section 71.152(b) provided:

> "Psittacine birds shall not be brought into the United States for the purpose of sale or trade. Psittacine birds may be brought in only for the purposes and under the conditions prescribed in subparagraphs (1) to (4), inclusive, of this paragraph, and subject to the provisions of Section 71.153."

The purposes for and the conditions under which such birds may be imported are not material to the case at bar. They were not complied with.

42 Code of Federal Regulations, Section 71.152(b) was promulgated by the Surgeon General under the authority vested in him by 42 United States Code Annotated, Section 264.

United States Code, Title 42, Section 271(a) provides:

> "Any person who violates any regulation prescribed under sections 264-266 of this title * * * shall be punished by a fine of not more than $1,000 or by imprisonment for not more than one year, or both."

It is appellant Buono's contention that the allegations of the indictment and the evidence produced by the Government tended to show commission of offenses and conspiracy to commit offenses punishable as misdemeanors under 42 U. S. C. A., Sec. 271(a). Appellant further contends that either, (1) the adoption of the Surgeon General's regulation making 42 U. S. C. A., Sec. 271(a) applicable to the importation of psittacine birds removes the importation of such birds from the operation of the

provisions of 18 U. S. C. A., Sec. 545, or, (2) both statutes were applicable to the case at bar; that violation of neither could be proven without proving violation of the other, and that, in these circumstances, the prosecution must be for commission of and conspiracy to commit the offense carrying the lesser penalty.

In *Steiner, et al. v. United States,* 9 Cir. 1956, 229 F. 2d 745, this Honorable Court rejected contentions similar to the foregoing without stating its reasons for so doing. Since the decision by this Court of the *Steiner* case, the United States Supreme Court has decided *Berra v. United States,* ..... U. S. ....., 100 L. Ed. 563, ... S. Ct. ..... In that case the Supreme Court refused to consider the effect of an overlapping of statutes proscribing misdemeanors and felonies, because the question was not properly raised below. Justices Black and Douglas, dissenting, took the position that the question had been adequately raised, and that in such a situation the Government has no election, but is bound to prosecute under the statute prescribing the lesser penalty. Appellant Buono respectfully submits that this Honorable Court should reconsider its decision in *Steiner v. United States, supra,* as to this point, in the light of the Supreme Court decision in the *Berra* case, *supra,* and should reverse the judgment in the case at bar, because the prosecution was improperly brought for violation of and conspiracy to violate 18 U. S. C. A., Sec. 545, rather than 42 U. S. C. A., Sec. 271(a).

II.

Appellant Buono Could Not Lawfully Be Indicted for nor Convicted of the Conspiracy Purportedly Charged in Count VII of the Indictment, in View of the Failure of the Government to Allege or Prove Facts Which Would Support a Conclusion That Such Purported Conspiracy Had Any Existence Separate From the Conspiracy Charged in Count IV.

The allegations of the indictment and the evidence relating to the question here discussed have been set forth in substance above. Appellant Buono was indicted on two conspiracy counts. The alleged purposes of the two conspiracies are identical. The alleged time of the count VII conspiracy, June-October, 1953, fell entirely within the period alleged for the count IV conspiracy, April, 1953-December, 1954. Three persons were named as conspirators in both counts, Clifford L. Duke, Jr., Vic Buono and Robert Helm. [Tr. of R. pp. 6-12.]

The evidence revealed additional identities in the allegedly separate conspiracies. In each the birds were to be, and were, obtained in Mexico from one Laimon. In each the birds were to be, and were, flown in by airplane, by Robert Helm. In each the birds after importation were to be, and were, disposed of in a similar manner. [Tr. of R. pp. 367, *et seq.*]

It is appellant Buono's contention that the facts alleged and the evidence adduced established that there was but one conspiracy. What was alleged to be a separate conspiracy under count VII was an inseparable part of the conspiracy alleged in count IV. All of the evidence adduced by the Government in support of count VII was admissible under the allegations of count IV. It is appel-

lant Buono's further contention that in order to state two conspiracy offenses in the same indictment the Government must allege facts the proof of which would establish separate conspiracies. In the case at bar count VII should, therefore, have been dismissed or consolidated with count IV because, on the face of the indictment, it appeared that it was part and parcel of count IV. Furthermore, since the Government's evidence showed that count VII was one with count IV, appellant Buono's motions for acquittal as to count VII and for a new trial as to counts VII, VIII, IX and X, should have been granted.

In answer to this the Government asserts that it has proven two conspiracies. The assertion that there were two conspiracies is based upon evidence that in connection with count VII a new airplane was obtained for Helm to use in flying in the birds, and that in connection with count IV there was an agreement, which was carried out, that after the birds were imported and all the federal offenses charged had been committed, some of the conspirators would hijack the birds from others who had brought the birds in pursuant to the conspiracy.

In support of its assertion that these facts establish two separate conspiracies, the Government relies upon *Kotteakos v. United States,* 328 U. S. 750, 90 L. Ed. 1557, 66 S. Ct. 1239. In that case thirty-two persons were indicted for conspiring to obtain loans insured by the Federal Housing Administration upon false applications. On hearing in the Supreme Court the Government admitted that the evidence showed not one, but at least eight separate conspiracies. Although all the conspiracies had similar purposes, they had nothing in common, except that one Brown was a party to each and acted as broker in all of the loan transactions. According to the Court, the con-

spiracies were arranged like the spokes of a wheel, with Brown as the hub and without a rim. The Government contended that the variance was not prejudicial to the appellants, of whom Brown was not one. The Supreme Court found prejudice and reversed the convictions.

Appellant respectfully submits that the *Kotteakos* case does not support the Government's position. In the first place, as this Honorable Court had occasion to point out in *Bridgeman v. United States,* 183 F. 2d 750, the Government conceded in the *Kotteakos* case that the evidence showed several conspiracies, so that question was not presented or determined by the Supreme Court in that case. Furthermore, the conclusion that there were more than one conspiracy in the *Kotteakos* case depended upon the peculiar factual situation in that case. It would appear from subsequent decisions that the factual situation was practically unique.

The leading case on the applicability of *Kotteakos v. United States, supra,* appears to be *Blumenthal v. United States,* 332 U. S. 539, 92 L. Ed. 154, 68 S. Ct. 248, affirming a decision of this Honorable Court which appears at 158 F. 2d 883. In that case five persons were charged with conspiracy to sell whiskey at above ceiling prices. The evidence disclosed a scheme to dispose of 4,000 cases of whiskey at above ceiling prices in a manner which would make the sales appear legitimate. The Court stated, at page 556:

> "And in a hypertechnical aspect the case as a whole might be regarded as showing in one phase an agreement among Goldsmith, Weiss and the unknown owner, X, and in the other an agreement among the five defendants to which X was not a party. Thus in the most meticulous sense it might be regarded as disclosing two agreements with Goldsmith and Weiss as figures common to both."

However, the Supreme Court went on to hold that there was but one conspiracy, pointing out that all the conspirators had a common object, that they must have known that others were involved in such a large undertaking, and that it is unnecessary that each conspirator know all the others or all the details of the conspiracy.

In *Bridgeman v. United States,* 9 Cir., 183 F. 2d 750, defendants were charged with mail fraud under a statute, 18 U. S. C. Sec. 338, which proscribed using the mails to execute a scheme or artifice to defraud. The evidence showed that one Rhodes was a manufacturer of peanut vending machines, that appellants and others were, "distributors", of the machines, that Rhodes provided the, "distributors", with, "sales kits", containing misrepresentations and generally controlled the manner in which resales were made, and that the mails were used in carrying out the scheme. The case was tried on the theory that the evidence showed one scheme. Appellants contended that this evidence showed numerous separate schemes in the pattern of the *Kotteakos* case (*supra*). This Honorable Court held that there was but one scheme, citing *Blumenthal v. United States, supra,* and pointing out that each distributor knew that he was part of a larger plan, and that others were distributing the product in the same way he was.

In *United States v. Rosenberg, et al.,* 2 Cir., 195 F. 2d 583, Julius and Ethel Rosenberg, David Greenglass, Anatoli Yakolev, and Morton Sobell were charged with conspiring between 1944 and 1950 to communicate information to the U. S. S. R. in violation of 50 U. S. C., Section 32. Sobell contended, page 600, that the Government's evidence showed two conspiracies, one between Rosenberg and Sobell to send abroad certain fire control and military

engineering information, and another between Rosenberg, Greenglass and one Gold, with which Sobell was not connected, to ship atomic information from Los Alamos to the Soviet Union. The trial Court denied Sobell's motion to dismiss the indictment made at the conclusion of the Government's case and instructed the jury on the one conspiracy theory. The Court of Appeals stated that if this was error it was prejudicial. However, the Court held that there was no error, that the evidence showed one conspiracy to send all kinds of defense information abroad, relying on *Blumenthal v. United States, supra,* and distinguishing *Kotteakos v. United States, supra.*

In *United States v. Witt,* 2 Cir., 215 F. 2d 580, the indictment charged that from December, 1946, to August, 1952, former Internal Revenue agents O'Brien, Tanaker, Witt, Inkeles, and Rourke conspired together and with unindicted co-conspirators Zelnick and Miller to defraud the United States and to defraud the United States in its governmental function of administering the revenue laws free from corruption. The evidence showed the following: In July, 1946, agents Tanaker and Miller conspired to take and did receive from Spector a bribe for a favorable tax report. In 1947 Miller and Tanaker obtained $5,000 from H & H to "clear up" a purported tax liability of well over $10,000. In June, 1947, Tanaker left the Internal Revenue Department, and in August of that year O'Brien became head of the Department Office in Troy, New York. In late 1948 O'Brien, at Miller's behest, arranged to have the Acme Glove case assigned away from a, "tough agent", and Tanaker, Rourke and O'Brien shared a $3,000 bribe for a favorable tax determination. In November, 1948, Miller arranged with Zelnick to take a $1,000 bribe to "fix" the Oppenheimer case. In June, 1949, the Barlowe return was "fixed" by Miller, Inkeles

and O'Brien, as was the Bell return by Tanaker, Miller, O'Brien and Witt. It was only then that O'Brien and Miller met. Thereafter numerous other bribes were taken in various other cases. Various combinations of persons participated in different cases. All of the conspirators did not participate in any one, and the bribes were shared only by those who participated. It was contended on appeal, in reliance on *Kotteakos v. United States, supra,* that the evidence showed not one, but several conspiracies. The Court of Appeals held that the evidence supported a finding of a single, over-all, continuing conspiracy, and that the fact that particular "fixes", were carried out by particular conspirators, were not known to all the conspirators, and the bribes therefrom were not shared by all, is not inconsistent with that conclusion. In so holding the Court relied on *Blumenthal v. United States, supra.*

Other cases in which the courts have recognized the limitations on the applicability of the decision in *Kotteakos v. United States* and have concluded that the evidence showed one, rather than several, conspiracies are:

Kaufman v. United States (6 Cir.), 163 F. 2d 404;

Berenheim v. United States (10 Cir.), 164 F. 2d 679;

Thomas v. United States (5 Cir.), 168 F. 2d 707;

Calvaresi v. United States (10 Cir.), 216 F. 2d 891;

Ritter v. United States (10 Cir.), 230 F. 2d 324.

Appellant Buono respectfully submits that an application of the reasoning of the foregoing cases to the case at bar makes it obvious that the facts alleged and the evidence offered by the Government show only one conspiracy in the case at bar. Counts IV and VII allege the purpose

of the conspiracy in substantially identical terms. [Tr. of R. pp. 6-12.] The evidence showed that at all times there was one continuous common object, the smuggling of psittacine birds into the United States. [Tr. of R. pp. 367, *et seq.*] The period of the alleged count VII conspiracy fell entirely within that alleged for count IV. [Tr. of R. pp. 6-12.] Counts IV and VII name three conspirators common to both, Duke, Buono, and Helm. [Tr. of R. pp. 6-12.] The evidence, some of which the jury evidently did not believe as to Buono, not only implicated these three, but showed that most, if not all, of the others named in either count had been involved together in bird smuggling. [Tr. of R. pp. 367, *et seq.*] In the transactions relied upon to support both counts the birds were obtained from one Laimon in Mexico and flown into the United States by Helm. [Tr. of R. pp. 368, *et seq.*]

The foregoing facts make it clear that this case cannot be fitted into the rationale of the *Kotteakos* case. In that case the result depended on the fact that the sole connecting link between the various conspiracies was the common membership of Brown, a situation which is clearly not duplicated in this case. On the contrary, the case at bar appears to be most closely analogous to the *Witt* case, *supra,* in which there was a single continuous large conspiracy, within which various combinations of the participants carried out particular transactions, as the needs of the situation dictated.

Appellant, therefore, respectfully submits that the allegations and evidence in the case at bar established but one conspiracy, the allegations and proof under count VII being inseparable from those under count IV. Buono's motions to dismiss count VII, to acquit on it, or to include

it within count IV, should, therefore, have been granted. In view of the stipulation that Buono could only be convicted of counts VIII, IX and X on the conspiracy theory, the jury could not properly and undoubtedly would not have convicted him of these counts alone. Therefore, in view of the errors as to the only conspiracy count of which he has been convicted, the convictions on counts VIII, IX and X based thereon, cannot stand. The trial Court, therefore, erred in denying Buono's motion for a new trial as to all counts on which he was convicted.

The errors complained of were prejudicial since they deprived him of his most fundamental right, a trial on the proper issues, and since they resulted in a conviction, which, but for such errors, could not have occurred. The judgment of conviction of appellant Buono must, therefore, be reversed.

Respectfully submitted,

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